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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

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HARRY LEROY KELLEY,

Appellant,

V.

TEXAS REAL ESTATE COMMISSION,

Appellee.

* * * *

ON APPEAL FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS

* * * *

MOTION TO DISMISS OR AFFIRM

* * * *

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MOTION TO DISMISS OR AFFIRM

Appellee Texas Real Estate Commission moves the Court, under Rule 16 of the Rules of the Supreme Court of the United States, to dismiss the appeal or, in the alternative, to affirm the decision of *Kelley v. Texas Real Estate Commission*, 671 S.W.2d 936 (Tex.Ct.App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.). This Court should decline to review the decision below because this appeal is not within the Court's jurisdiction, and because the issues presented by the decision of the court below do not warrant further argument.

STATEMENT OF THE CASE

After the Texas Real Estate Commission revoked the real estate broker license of Harry Leroy Kelley by Order dated May

5, 1983, Kelley sought judicial review of that administrative decision in the 61st Judicial District Court of Texas, Harris County. The court affirmed the decision of the Commission by Order dated August 10, 1983. Kelley then appealed to the Houston Court of Appeals for the Fourteenth Judicial District of Texas, which also affirmed the decision of the Commission in an Opinion issued April 26, 1984.

Kelley then sought review by the Texas Supreme Court by Application for Writ of Error filed June 18, 1984. On October 10, 1984 the Texas Supreme Court refused Kelley's Application for Writ of Error, noting no reversible error. The Texas Supreme Court then overruled Kelley's Motion for Rehearing of his Application for Writ of Error on November 14, 1984.

ARGUMENT

The Supreme Court may review final judgments rendered by the highest court of the state by appeal if the validity of the state law is attacked as repugnant to the United States Constitution and the state court has upheld its validity. 28 U.S.C.A. §1257(2). Where the Appeal raises federal constitutional attacks to the state law which were not raised, considered, or expressly passed on in the state courts, the Court should dismiss the Appeal. The Court should dismiss this Appeal because it seeks review of federal constitutional issues neither raised nor expressly passed on the state courts. Sup.Ct.R. 16.1(b).

The Supreme Court is vested with "...no jurisidiction unless a federal question was raised and decided in the state court below..." in cases on appeal from state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). To vindicate jurisdiction it must first be decided whether the federal question was presented to the state courts "...in such a manner that it was necessarily decided..." by the state court. *Street v. New York*, 394 U.S. 576, 581 (1969). The record must be examined with "...sufficient rigor..." as there "...should be no doubt..." that the federal claim was "...either expressly or by clear implication...adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 499, 501, 496-97 (1981).

Comity requires that the state courts be given the first opportunity to consider federal constitutional questions involving the acts of state officials and "...proposed changes in existing remedies for unconstitutional action..." *Webb, supra,* at 499; *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2323 (1983). There exists "... reasons of peculiar force..." involving "...due regard for the appropriate relationship of this Court to state courts..." which restrain the Supreme Court from considering questions not presented to the state courts. *Gates, supra,* at 2322, *quoting McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940).

The Court has considered federal questions where it was not absolutely clear that they had been presented in the state courts, treating the rule against considering such issues as "merely a prudential restriction". *Gates, supra,* at 2322, 2324; *see Vachon v. New Hampshire,* 414 U.S. 478 (1974). More "weighty prudential considerations" have, however, recently motivated the Court "...to adhere scrupulously to the customary limitations on our discretion...", *Id.,* at 2325, to avoid "untoward practical ramifications", *Id.,* at 2325, and the "unseemly" nature of federal reversals of state court decisions. *Webb, supra,* at 500, *quoting Picard v. Connor,* 404 U.S. 270, 275 (1971).

As the Court stated in *Webb, supra,* at 500:

> (t)here are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner.

> Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case...

Since the Court assumes that state courts are competent to adjudicate federal constitutional claims, these federal issues should be heard at the state level first. *D.C. Court of Appeals v. Feldman*, 460 U.S. 472, 484 F.N. 16 (1983). This rule of avoiding on jurisdictional grounds resolution of federal constitutional issues first pursued in the Supreme Court has been reiterated in *New York v. Quarles*, 467 U.S._____, 104 S.Ct. 2626, 2637 F.N. 2 (O'Connor, J., concurring in part and dissenting in part), 2649 F.N. 11 (Brennan, J., dissenting) (1984).

The jurisdictional requirements are not met in this Appeal. The federal constitutional issues raised in the Jurisdictional Statement have not yet been presented to, nor considered by, the Texas courts. Certainly no state court in Texas has expressly passed on these constitutional questions. Kelley errs when he states that he raised these issues in the state courts. (Jurisdictional Statement, at 6). One searches in vain to find any reference to the United States Constitution in the state court proceedings. No such issue was ever articulated in any pleading before the trial court, nor the Court of Appeals. Contrary to his assertion that he raised the issue in his Motion for Rehearing before the 14th Court of Appeals (Jurisdictional Statement, at 6), it is an obstacle one finds insurmountable to locate any reference in the Motion for Rehearing. Moreover, his admission that he did not raise the issue until then shows that it was untimely and improperly raised. Why was it not raised before the trial court? Why was it not raised before the Court of Appeals prior to its decision?

Kelley's Application for Writ of Error to the Texas Supreme Court also fails to mention this now important issue. Kelley's filing of a "Supplement/Amendment" to his Application for Writ of Error proves this point. Had he properly raised the issue, what need would there have been for an amendment? It must be noted that Kelley surfaced with this "Supplement/Amendment" after the State had filed its response to Kelley's Application for Writ of Error.

No Texas court has ever had submitted to it, and certainly never expressly passed on, the constitutional claims Kelley now asserts in this case. Comity in federal-state relations dictates dismissal of this Appeal. It would be "unseemly" for this Court now to hear these questions in light of its goal to "adhere scrupulously" to the limits of its jurisdiction. Texas courts should have had a chance to assay these federal claims. Such an opportunity may have avoided the need for any federal consideration. Texas has an important state interest in protecting its citizens from unscrupulous real estate brokers as well as in construing its own statutes. Texas courts are concerned with state laws attacked as unconstitutional. The record on these accusations should have been developed in state court. Surely Texas courts should have been given the opportunity to consider these questions first, particularly in light of their competency to consider these questions. Kelley denied Texas its opportunity to consider these questions. The Court should decline to consider them now.

This appeal should be dismissed additionally as it does not present a substantial federal question. Sup.Ct.R. 16.1(b). The Texas statutes are attacked as unconstitutionally vague, arbitrary and capricious, and repugnant to the United States Constitution. The statutes authorize revocation of a real estate license for conduct which includes making a false promise, or constitutes dishonest dealings, bad faith, or untrustworthiness. TEX.REV.CIV.STAT.ANN. art. 6573a, §15(4)(B), §15(4)(V) (now §15(6)(B), §15 (6) (V)). These state laws are not unconstitutionally vague, nor arbitrary and capricious, nor repugnant to the United States Constitution.

Laws containing language eminently more ambiguous have been upheld. The Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), upheld as constitutionally sufficient against allegations of overbreadth and vagueness statutory language which authorized dismissal of federal employees for "such cause as will promote the efficiency of the service." *Id.*, at 160 (1974). The revocation of a medical license for conduct constituting "grossly unprofessional or dishonorable conduct, or a character which in the opinion of the Board is likely to deceive or defraud the public" was upheld in *Martinez v. Texas State Board of Medical Examiners*, 476 S.W.2d 400, 403-404 (Tex.Civ.App.

—San Antonio 1972, writ ref'd n.r.e.), *appeal dismissed for want of a substantial federal question,* 409 U.S. 1020 (1972). As the Court said in *Arnett, supra,* at 159,;

> ...(t)here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest...,

quoting Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-79 (1973). Ordinary people exercising "ordinary common sense" certainly understand what dishonest dealings, bad faith, and untrustworthiness mean. Additionally, the Texas Real Estate Commission has the special expertise to apply these terms to the conduct of a licensed real estate agent who deals with the public. Certainly these statutory terms are clearer than "unprofessional conduct" and "promoting efficiency."

While many of the cases cited in this Motion deal within review under petitions for certiorari, the cases generally refer to jurisdictional authority under 29 U.S.C.A. §1257. If the Court determines to review this appeal as though by writ of certiorari, under that manner of review these same authorities in support of the same analysis apply and this petition should be denied. 28 U.S.C.A. §2103. *Perry Educ. Assn. v. Perry Local Educator's Assn.,* 460 U.S. 37, 43 (1983), *Palmore v. United States,* 411 U.S. 389, 394-97 (1973).

CONCLUSION

The Appeal of Harry Leroy Kelley should be dismissed for lack of jurisdiction because the federal constitutional issues he now raises before the Supreme Court were not raised, considered, nor decided in the state courts. This Appeal should also be dismissed for want of a substantial federal question, or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

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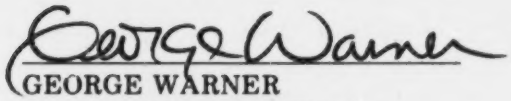

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded by certified mail, return receipt requested, to Margaret Garner Mirabal, Mirabal & Associates, 4606 F.M. 1960 West, Suite 310, Houston, Texas 77069, on this the 27th day of February 1985.

GEORGE WARNER